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In The

Supreme Court of the United States

October Term, 1964

No. 861

ALBERT J. MINICHELLO, NICHOLAS MAURIELLO and YGNATZ YUCHNIS, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated,

Petitioners

vs.

JAMES J. SAXON, Comptroller of Currency for the United States of America, FIRST NATIONAL BANK OF EXETER, WYOMING NATIONAL BANK OF WILKES-BARRE, AUGUST J. LIPPI, ETTORE LIPPI, JOHN LIPPI, JOHN B. CAMPBELL, GEORGE MAFFEI and HAROLD REICH,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Plaintiffs above-named through Arthur D. Dalessandro, Joseph J. Ustynoski, Conrad A. Falvello, and Anthony C. Falvello, Esquires, their attorneys, pray that the Supreme Court of the United States issue a Writ of Certiorari to review the judgment of the United States Court of Appeals of the Third Circuit entered in the above case on September 18, 1964.

OPINIONS BELOW

The opinions delivered in the Courts below are as follows:

(a) Opinion of the District Court for the Middle District of Pennsylvania filed July 2, 1962 (Appellants' Appendix, pp. 33a-35a) and reported in 207 F. Supp. 299; Opinion of the District Court for the Middle District of Pennsylvania filed July 12, 1963 (Appellants' Appendix, pp. 123a-130a); Opinion of the Court of Appeals for the Third Circuit filed September 18, 1964 and reported in 337 F. 2d 75.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit sought to be reviewed was made and entered on September 18, 1964 and a copy thereof is appended hereto in the Appendix at pp. 21-39. On October 5, 1964, a motion for extension of time within which to file a petition for rehearing was filed by the Comptroller in the Circuit Court, which on October 8, 1964 filed an order allowing the extension up to October 20, 1964. On October 17, 1964, the Comptroller filed his petition for rehearing which by order of November 3, 1964 the Circuit Court denied. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i).

QUESTIONS PRESENTED

In a derivative shareholder's class action to invalidate a sale of the assets of the First National Bank of Exeter, Exeter, Pennsylvania, the plaintiffs, who are minority shareholders of Exeter Bank, contended: (1) That the Board of Directors of Exeter Bank had no power or authority to sell all the assets while a Conservator was officially in charge of the affairs of the bank under 12 U.S.C. 192, 203; (2) That the purchase and sale agreement was void because the Conservator did not sign or get court approval of the sale, 12 USC 192, did not advertise return of the bank to its directors as required by 12 U.S.C. 208, and because the shareholders did not vote to go into voluntary liquidation (Wyoming Bank Appendix, 14b) under 12 U.S.C. 181; and (3) Th . the Comptroller of Currency had no power to waive stockholder approval of the voluntary liquidation and sale of assets under 12 U.S.C. 181 where there was no actual financial emergency and the bank was solvent. The District Court for the Middle District of Pennsylvania by order of July 2, 1962 dismissed the complaint as to the Comptroller prior to trial on the ground the Comptroller's discretion was nonreviewable. After a trial at which plaintiffs were prevented from calling in to question and submitting evidence on the acts of the Comptroller, and were refused permission to offer evidence of a lack of financial emergency and of the solvency of the bank, the complaint was dismissed as to all the other defendants by the District Court Order of July 12, 1963. Upon appeal by plaintiffs, the

Court of Appeals reversed both orders of the District Court, reinstated the Comptrolier as a party and remanded the case, but only for the limited and restricted purpose of determining "whether or not an emergency existed respecting the Exeter Bank within the purview of Section 181" subject to the condition that "the standard to be applied is not whether an emergency in fact existed, but whether a reasonable man on the basis of the facts of which he was aware or should have been aware, could have reasonably concluded that an emergency existed"(Appendix to this Petition, p. 38), so as to justify the Comptroller's waiver of stockholders' approval of the sale, although even if there was in fact such an emergency the law does not allow the Comptroller to do what he did. The questions for review are:

1. Did the majority directors of the Exeter Bank on February 26, 1962, between 10:00 a.m. and 12:00 noon, have any power or authority to accept an offer of the Wyoming Bank to buy all the assets and assume all the liabilities of the Exeter Bank when on said date and time there was a conservator appointed by the Comptroller of the United States officially and exclusively in charge of all the assets and affairs of the Exeter Bank?

2. Where the conservator did not negotiate the sale or sign the contract, did not get court approval of the sale and the purchase and sale agreement, did not advertise return of the Exeter Bank affairs to its directors, and where the Exeter Bank shareholders did not vote to go into voluntary liquidation by the required 2/3 vote, nor did they approve the purchase and sale agreement, was the purchase and sale agreement of February 26, 1962,

between the Exeter Bank and Wyoming Bank a valid, legally binding contract?

3. Did the Comptroller of Currency have the power to waive stockholder approvai of voluntary liquidation of the Exeter Bank and stockholder approval of the sale of all of its assets where there was no actual financial or other emergency and the bank was in fact solvent?

4. Could all of the assets of the Exeter Bank which was solvent and in no financial or other emergency be sold by six out of ten members of its board of directors without approval of the vote of shareholders owning 2/3 of the stock of the bank?

STATUTES INVOLVED

The pertinent portion of the National Banking Law RS 5220 (12 U.S.C. 181, 192) and of the Bank Conservation Act, 48 Stat. 2, 3, 4 (12 U.S.C. 203, 205, 208) are set forth in the Appendix at pp. 45-50.

STATEMENT OF THE CASE

This is a derivative class action in equity primarily to declare illegal and void the actions of the majority directors of the First National Bank of Exeter, Pennsylvania, on the morning of February 26, 1962 and to declare illegal and void a purported contract selling all assets of the Exeter Bank to the Wyoming National Bank of Wilkes-Barre, Pennsylvania. Petitioners, two of whom were directors, are minority stockholders of the Exeter Bank. Respondents are majority directors of the Exeter Bank, the Exeter Bank, the Wyoming National Bank, and the Comptroller of Currency. Appellants' Circuit Court Appendix will hereafter be referred to by page number followed by small letter "a".

On January 29, 1962, a defalcation was made known to the ten-man Board of Directors of the Exeter Bank. The Chief National Banking Examiner for the District informed the directors that the defalcation would be in the amount of approximately $200,000 to $400,000 (p.

125a). At the time of the defalcation, all depositors' savings accounts were insured up to $10,000 by Federal Deposit Insurance Corporation and further the depositors and creditors of the Exeter Bank were protected by $1,200,000 of fidelity insurance coverage (pp. 62a, 86a). A subsequent certified audit revealed that the shortage was $459,710.22. The Exeter Bank had capital of $75,000.00, a surplus of $225,000.00, and approximately $50,000.00 undivided profits (Saxon, Circuit Court Appendix, 1b).

The conservator, a former National Bank Examiner, was appointed for the Exeter Bank by the Comptroller of Currency by telegram dated February 19, 1962 at 6:30 p.m. The conservator was discharged by telegram from the Comptroller of Currency dated at Washington, D.C. on February 26, 1962 at 6:14 p.m. (pp. 109a-112a, 120a).

Deposits were accepted by the conservator during his conservatorship (p. 43a) and the bank continued to operate in the usual way subject to a limitation that only ten percent could be withdrawn from any account (Appendix to this Petition, p. 41). The telegram of termination of conservatorship from the Comptroller stated "the assets of the bank and the control of its affairs will be returned to its Board of Directors for the purpose of executing a sale of all the assets of the bank to the Wyoming National Bank of Wilkes-Barre" (p. 112a). There was no advertisement of the return of the affairs of the bank to its Board of Directors (pp. 42a, 43a) as required by law (12 U.S.C. 208).

While the conservator was personally in charge of the affairs of the Exeter Bank, the directors of the Exeter Bank met at the banking house on February 26, 1962 be-

tween 10:00 a.m. and 12:00 noon, and six of them voted to accept an offer submitted by the Wyoming National Bank to buy all the assets and assume all the liabilities of the Exeter Bank (pp. 44a, 69a). The six individual defendants (majority directors) (pp. 54a, 83a) voted to accept that offer, but three minority directors did not vote because the Exeter directors, under the Bank Conservation Act, had no power or authority to do any act whatsoever relevant to the affairs of the Exeter Bank. The conservator himself did not sell the bank, and did nothing whatsoever in connection therewith; in particular, he did not petition the court as required under federal law for approval of a sale of the bank (p. 42a).

On or about the 26th day of February, 1962, the Comptroller approved the illegal and void acts of the directors of the Exeter Bank which were taken on the morning of February 26, 1962, in attempting to sell all the assets of the Exeter Bank (p. 127a).

At the trial, the District Court refused to allow plaintiffs to submit evidence on the actions and failure to act by the Comptroller and his conservator and on the question of the financial condition, solvency and lack of any emergency concerning the Exeter Bank affairs at the times material to this action (pp. 37a, 76a, 77a, 78a, 79a, 99a, 101a, 102a). The District Court first dismissed the action against the Comptroller of Currency and thereafter dismissed the action against all other defendants at the conclusion of the plaintiffs' case (pp. 105a, 125a).

Upon appeal to the United States Circuit Court for the Third Circuit, the orders dismissing the complaint against all defendants were reversed and the case remand-

ed. However, the Court of Appeals limited and restricted the issue on remand to whether or not the Comptroller as a reasonable man on the basis of the facts of which he was aware or should have been aware, could have reasonably concluded that an emergency existed as to permit him to waive stockholder approval of the sale of the assets of the bank. The Court of Appeals determined all other issues against plaintiffs.

The basis for federal jurisdiction in the Court of first instance is 28 U.S.C. 1343, 28 U.S.C. 1394, and 12 U.S.C. 94. Federal jurisdiction is also based on the fact that the suit involves an interpretation of laws passed by the Congress of the United States.

REASONS FOR GRANTING THE WRIT

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked are as follows:

(a) The case involves the interpretation of the National Banking Laws and the Banking Conservation Act (12 U.S.C. 181, 192, 203, 205, 208) and the administration of said laws. (b) The Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of the United States Supreme Court and other Circuit Courts on matters similar to the case at hand. (c) The important national question of whether the Comptroller of Currency of the United States of America can waive the National Banking Law requirement that a national bank can only go into voluntary liquidation by approval of the shareholders owning two-thirds of the out-

standing stock. (d) The great public importance of the question as to whether a board of directors can sell a national bank when a conservator is in charge of the affairs of said bank. (e) The great public importance of the question of the duties, responsibilities and liabilities of conservators of national banks.

The decision of the Court of Appeals should be reviewed because its effect is to permit the sale of all of the assets of a solvent national bank by a mere majority (six out of ten) of its board of directors without shareholder approval, without court approval when there was a conservator in charge of the bank, and upon a waiver by the Comptroller of a requirement for shareholder approval upon his "reasonable" conclusions that an emergency existed. The Circuit Court erred in holding that the majority directors of Exeter Bank by their actions could stop minority shareholders in a class action from questioning their power to sell the assets while a conservator, who was in complete control of the bank, was still in power. The Circuit Court also erred in failing to hold that a sale of the assets of this national bank by the directors was void because the conservator did not participate in its negotiation or execution, did not get court approval of the sale and sale agreement, and did not advertise return of the bank to its directors as required by law. 12 U.S.C. 192, 205, 208. The Circuit Court erred in remanding the case, all be it for the introduction of all relevant testimony, but for the limited issue of determining not whether an emergency in fact existed but whether under 12 U.S.C. 181 the Comptroller, based on all of the facts which he was aware or should have been aware reasonably determined that an emergency existed which permitted him

to waive the required shareholder approval of the sale of the assets.

1. The appointment of a conservator under 12 U.S.C. 203, gives complete and exclusive possession and control of the bank affairs and assets to the conservator who has the same rights, duties and responsibilities as a receiver of an insolvent national bank. While the conservator is in charge there is one, and only one, way to sell a national bank and that is by the conservator, and he can only do so by first petitioning the District Court for approval and obtaining said approval. 12 U.S.C. 203, 192. Voluntary liquidation is a legal impossibility because 12 U.S.C. 203 provides, ". . . During the time such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to other provisions of this Act, be the same as if a receiver had been appointed therefor".

The conservator for the Exeter Bank was appointed February 19, 1962 at 6:30 p.m. (109a, 110a). A conservator is the administrator of a trust: *Wittnebel v. Loughman*, 9 F. Supp. 465, aff. 80 F. 2d 222, 224 (1935 C.C.A. 2d), cert. denied, 56 S. Ct. 590, and he represents stockholders as well as creditors. *Michelson v. Penney*, 135 F. 2d 409, 416 (2nd Cir. 1943).

As conservator, he took control of the bank and accepted deposits (43a). During his conservatorship "the bank continued to have the confidence of the public . . . there was no rush on the part of the depositors to withdraw the amount permitted, but the bank continued to operate in the usual way subject to the limitation." (Comptrollers' letter to Chairman of House Banking Committee dated April 11, 1962, Appendix pp. 40-44.) While a

conservator is in charge of the bank, the officers and directors have no authority whatsoever to act since a conservator has the same powers as a receiver of an insolvent bank. *Wilson vs. Awalt* (1933), 2 F. Supp. 465, 468; *General Electric Realty Corp. vs. First National Bank of Detroit* (1938), 23 F. Supp. 664, 666. The assets of the bank passed to the exclusive control of the conservator. *Anderson v. Cronkleton,* CCA Neb. (8th Cir. 1929), 32 F. 2d 170, 171; *Earle vs. Pennsylvania,* 178 U.S. 449. Even the Comptroller's telegram appointing the conservator stated, ". . . during your encumbency the old directors and officers of the bank are without authority to act" (Ex. 14, 120a, 121a). Notwithstanding that they had no power or authority to act, the majority directors of the Exeter Bank on February 26, 1962, between 10:00 a.m. and noon, attempted to accept an offer of Wyoming National Bank to purchase all the assets and assume the liabilities (44a). The conservator was not discharged until 6:14 p.m. that same evening (111a, 112a). The contract of sale was signed before the conservator was discharged (44a, 127a). The conservator did not negotiate nor sign the contract of sale and did nothing in regard to the sale, nor did he petition any court for approval thereof (42a). Notwithstanding that he accepted deposits, he did not advertise the return of the bank to the board of directors, as required by law (43a, 44a), 12 U.S.C. 208. The return of the bank to the board of directors was for the restricted purpose of "executing a sale of all the assets of the bank to the Wyoming National Bank of Wilkes-Barre" (Ex. 10, 111a, 112a). Even this was illegal because the termination of a conservatorship with the return of the bank to the board of directors can only be for the single and restricted purpose of permitting the bank

"to resume the transaction of its business" (12 U.S.C. 205), and the sale of all assets of a bank under these circumstances is not resuming the transaction of its chartered business purpose as bank business is defined in 12 U.S.C. 24, Section Seventh; 12 U.S.C. 21. *Kimen v. Atlas Exchange National Bank of Chicago*, 92 F. 2d 615, 617 (CCA 7th, 1937), cert. denied 58 S. Ct. 746; 9 *C.J.S.*, Sec. 654, p. 1208; *Evans v. VanDyke*, 97 F. 2d 18, 19 (CCA 3rd, 1938).

Thus, when the majority directors attempted to sell the assets, they had no power to act because of the existence of the conservator who in fact did not participate in the sale, although he was the only one who could sell the assets and he could do so only by obtaining court approval. The objection to the contract is not only that the corporation ought not to have made it, but also that it could not make it and it is therefore wholly void. *Dillon, Read & Co. v. Commercial State Bank* (3rd Cir., 1932), 62 F. 2d 606, 608; *Central Transportation Co. v. Pullman Palace Car Co.*, 139 U.S. 24, 11 S. Ct. 474, 488.

2. It is clear in 12 U.S.C. 192 and 203 that an order of a court of competent jurisdiction is a condition precedent to the sale of assets when a conservator is in charge. Without such approval there is no binding contract. *Reibman vs. F.D.I.C.*, 66 F. Supp. 409, 410, aff. (3rd Cir., 1946) 156 F. 2d 371; *Earle vs. Pennsylvania*, 178 U.S. 449, 20 S. Ct. 915 (1900); *Mitchell v. Joseph* (1941, CCA 7th), 117 F. 2d 253, 254, 255; *Roth v. Hood* (CCA 3rd, 1939), 106 F. 2d 616, 618; *Baker v. Schofield* (9th Cir.), 221 F. 322, 328; *Davis Trust Co. v. Hardee* (CCA, D.C., 1936) 85 F. 2d 571, 573; *Ex Parte Moore*, 6 F. 2d 905, 910 (1925); *Matter of the Receivership of the Home National Bank*

of Ellenville, N. Y., 147 F. Supp. 389, 391; *Armstrong v. Woolley* (CCA 5th, 1937), 89 F. 2d 295, 296. In *Reibman v. F.D.I.C.*, the Court stated at p. 410,

> "Moreover, under 12 U.S.C. 192 . . . it is requisite that any sale to be a valid one must be approved by the Comptroller and subsequently by the Court and until such is the fact, it does not become a binding contract."

The purpose of requiring court approval is to provide a check upon the broad powers given to the Comptroller and his agents. *Griggs vs. Baumer* (3rd Cir., 1942), 130 F. 2d 899, 901; *Hulse vs. Argetsinger* (2nd Cir., 1927), 18 F. 2d 944, 945. Until the order is first obtained the sale is in no sense legal, there is no binding contract, and the bidder merely occupies the position of a continuing offeror. *Griggs vs. Baumer,* supra, 902; *Reibman vs. F.D.I.C.*, supra, 409, 410. A sale of assets which has the effect of relieving the conservator of his statutory duties is invalid, *Ex Parte Moore*, 6 F. 2d 905, 910 (1925). No rights can be obtained under a void contract. *Marion v. Sneeder*, 291 U.S. 262, 54 S. Ct. 421; *Roth v. Hood*, supra, p. 618.

3. It is basic and fundamental that the directors of the Exeter Bank had no power to liquidate the bank under Section 181 (which is the section under which they and the Comptroller purported to act) so long as the bank was solvent and not actually in a financial emergency, and so long as the shareholders had not voted to liquidate.

Section 181 provides:

> "Any association may go into liquidation and be closed by the vote of the shareholders owning two-

> thirds of its stock. If the liquidation is to be effected in whole or in part by the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval."

They then follow elaborate provisions for the carrying out of the liquidation.

While Section 181 provides that in an emergency the Comptroller may waive shareholder approval of the *buy and sell agreement*, he may not waive shareholder approval of the *initial act to go into voluntary liquidation*. The first sentence of Section 181 gives an absolute control to the shareholders owning 2/3 of its stock and there is no provision for waiver of that approval. It is only after the shareholders vote to voluntarily liquidate a solvent bank, that shareholder approval of the actual sale of assets can be waived in an emergency. Section 181 provides for two acts of the shareholders, only the second of which may be waived.

Congress clearly intended this when it said "*If* the liquidation is to be effected . . . by the sale . . . of its assets . . . the purchase and sale agreement must *also* be approved by its shareholders . . ." (12 U.S.C. 181) (Emphasis added.)

Even if the directors were in charge of the bank affairs and there was no conservator in charge, there is no power whatever in the directors to liquidate a bank or sell its assets under Section 181 so long as the bank is solvent

and not in failing condition. In *City National Bank of Huron vs. Fuller,* 52 F. 2d 870 (CCA 8th), the Comptroller had found the bank to be insolvent and the Court agreed it was in a financial condition closely approaching insolvency in fact. The Court there indicated that the liquidation was not a voluntary one since the Comptroller took possession under Section 191 of the Code (appointment of receiver) and therefore the directors had power to sell. The Court said significantly at page 872,

> "The power granted to directors refers to ordinary business transactions of a corporation. It is the duty of directors of a failing corporation to do what they can to conserve the property . . . if a concern is in fact a going concern the board of directors ought not to be permitted to strike it down by selling all of its assets. The situation is entirely different when a corporation is not a going concern . . ."

Further, the Court stated:

> "We do not think Section 181, 12 U.S.C.A., has any application here as there was no voluntary dissolution of the corporation we are dealing with, and said section is applicable only to a solvent bank."

The power of the directors to sell depends therefore upon whether the bank is solvent or insolvent or on the verge of insolvency. In the instant case the Comptroller and majority directors purported to act under Section 181 which is available only to a solvent bank. When the Comptroller acts contrary to law his actions are reviewable by the courts. *LaParr v. City of Rockford* (CCA 7th), 100 F. 2d 564, cert. denied 59 S. Ct. 821; *U. S. National Bank of LaGrande vs. Pole,* 2 F. Supp. 153. Any mistake by the

Comptroller and conservator in violation of their legal powers, even if made in good faith, necessitates rescission of the unauthorized act. *LaParr vs. City of Rockford,* supra. The Exeter Bank at no time lost the confidence of the banking public as the Comptroller himself stated: "In spite of its difficulties the bank at no time lost the confidence of the banking public in Exeter and there was no run or heavy withdrawals of deposits." (Comptroller's letter to Chairman of House Banking Committee dated April 11, 1962 (Appendix, p. 41). The Comptroller further stated in said letter that even during the conservatorship: "the bank continued to have the confidence of the public, there was no rush on the part of the depositors to withdraw the amount permitted, *but the bank continued to operate in the usual way subject to the limitation.*" (Emphasis added.) (Appendix, p. 41.)

The Exeter Bank was always readily able to meet its maturing obligation and was never insolvent. The Comptroller completely disregarded the law as stated in *Michelson v. Penney,* 135 F. 2d 409 (CCA 2nd), that "Insolvency in a national bank is a present inability to meet current maturing obligations rather than a mere excess of liabilities over assets," even though there was never an excess of liabilities over assets in the Exeter Bank. The status of insolvency is determined by closing of the bank doors rather than the theoretical state of the balance sheet. *Smith v. Witherow,* 102 F. 2d 638 (CCA 3rd). The Exeter Bank never closed its doors for business.

4. In *Richter vs. Laredo National Bank* (CCA 5th), 62 F. 2d 289, involving the sale of a national bank the Court stated (page 291):

> "While a bank is a going concern and in the absence of an extreme emergency, the directors may not make a complete transfer of its properties without the consent of its stockholders, circumstances requiring emergency action to save the bank from failure and the depositors from loss do confer upon the directors the authority to make contracts of the general nature of the one in question here. When they have so acted in the face of an apparent emergency, the contract stands unless the stockholders can in a timely attack upon it show either that there was no real emergency, or though there was an emergency that the contract was made in fraud or bad faith, or was so oppressive as to entitle them to relief against it."

On March 6, 1962, the stockholders in the instant case brought a timely attack against the contract of sale, instituting the action in equity against the majority directors and the parties to the contract eight days after the contract was entered into. The shareholders did not acquiesce in the sale and in fact when the liquidation was put to a vote before the shareholders two months later it was voted down (p. 74a).

Throughout the trial the plaintiffs attempted repeatedly to show the financial condition of the Exeter Bank, that it was solvent, that there was no lack of confidence in it and that there was no emergency. The Comptroller filed an affidavit in the District Court (Appendix of Defendant-Appellee, James J. Saxon) and also sent a letter to the Honorable Brent Spence, Chairman of the House Committee on Banking and Currency. The letter (April 11, 1962), which is also part of the District Court record,

said the bank was solvent and in no emergency, yet the affidavit, sworn to March 28, 1962 (15 days earlier) stated, "By February 26, 1962, I had concluded that the bank was insolvent . . ." (Saxon Appendix, p. 3b). While the effect of the Circuit Court opinion is to permit these matters to go into evidence, the restriction upon the issue, i.e. whether the Comptroller reasonably concluded that an emergency existed rather than the real issue of whether or not there was in fact an emergency as contemplated by Section 181 seriously and unduly restricts the effect of such evidence. Section 181 permits waiver of stockholder approval of the sale agreement (where there is no conservator) only in the event there is an actual emergency and the plaintiffs should prevail upon proof that there was not in fact an actual emergency. Along this line it is pointed out that this bank was covered by Federal Deposit Insurance up to $10,000.00 for each account and there was primary fidelity bond coverage of $200,000.00 which was not disputed, and a secondary bond coverage of $1,000,000.00 which was finally paid at 50% of the liability thereon (pp. 39a, 62a), more than adequately covering the alleged defalcation and certainly indicating there was no emergency in fact.

We have here a solvent national bank in conservatorship which did not, even according to the Comptroller, lose its public confidence but which the Comptroller permitted to be sold without the fundamental right of stockholders to vote for voluntary liquidation, without the protection of an antecedent court approval of the sale as required by law, and without any actual emergency requiring haste. The questions presented by this case are of great and recurring significance and affect the economy of

the country in the administration of the national banking laws, and in determining the extent to which shareholders are to be protected against actions which deprive them of their property without their approval and without the opportunity of fully reviewing the facts upon which the directors and the Comptroller purport to act. The serious questions of the proper interpretation and application of the national banking laws involved here and the effect of the decision below, if permitted to stand, upon the powers and duties of the Comptroller and of the boards of directors of national banking institutions and upon the rights of shareholders and the resulting effect on the economy of the country make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

ARTHUR D. DALESSANDRO,
JOSEPH J. USTYNOSKI,
CONRAD A. FALVELLO,
ANTHONY C. FALVELLO,
Attorneys for Petitioners.

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 14560

Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated, Incorrectly Described in the Summons and Complaint as Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis,

Appellants

v.

James J. Saxon, Comptroller of Currency for the United States of America; First National Bank of Exeter; Wyoming National Bank of Wilkes-Barre; August J. Lippi; Ettore Lippi; John Lippi; John B. Campbell; George Maffei and Harold Reich

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued April 15, 1964
Before Biggs, Chief Judge, Hastie, Circuit Judge, and Kirkpatrick, District Judge

OPINION OF THE COURT

(Filed September 18, 1964)

By Biggs, *Chief Judge.*

This is a derivative shareholders' action to invalidate a sale of assets of the First National Bank of Exeter ("Exeter bank") to the Wyoming National Bank of Wilkes-Barre ("Wyoming bank"). Plaintiffs are minority shareholders of the Exeter bank. Defendants are the Exeter bank and various members of its board of directors, the Wyoming bank and the Comptroller of the Currency. The plaintiffs have appealed from an order of the court below entered on July 2, 1962 dismissing the action as against the Comptroller and an order of dismissal as against all other defendants entered on July 12, 1963.

The case was tried to the court below without a jury. The essential facts are not in dispute. On or about January 29, 1962 a defalcation of approximately $200,000 was discovered at the Exeter bank. As an audit of the bank progressed the shortage was found to exceed $400,000. Between January 29, 1962 and February 19, 1962, the Comptroller urged that there be a reorganization or a sale of the bank. No progress having been made in respect to either, on February 19, 1962, pursuant to Section 203, 12 U.S.C.A., the Comptroller appointed a conservator for the Exeter bank.

On the morning of February 26, 1962 the Wyoming bank offered to assume all the liabilities of the Exeter bank, except its liabilities to its shareholders, accept all its assets and pay a premium of $120,000. plus 40% of any recovery on its excess bond. Outstanding at this time,

among other offers which need not be detailed, was a purchase offer submitted by the First National Bank of Pittston ("Pittston bank"). This offer was to assume stated liabilities, purchase acceptable assets to cover those liabilities, and pay a premium of $186,500. The Pittston bank proposal was subject to the condition that "the net value of assets over liabilities, plus the premuim, will be held in escrow for a period of six months, out of which losses not covered by . . . [Exeter's] primary and excess bonds and claims against undisclosed shortages may be charged."

At a special meeting of the board of directors of the Exeter bank on the morning of February 26, 1962, the offer of the Wyoming bank was accepted by six directors voting in favor and three not voting.[1] At a special meeting of the board of directors of the Wyoming bank on the afternoon of the same day, the action of the officers of the Wyoming bank in making the stated offer was approved unanimously. The nine directors of the Exeter bank who had held their own meeting that morning, attended the directors' meeting of the Wyoming bank and none of them expressed any disagreement with the action taken.

On February 26, 1962 the following telegram dated 6:14 P.M., E.S.T., was sent by the Comptroller to the Exeter bank: "I am now satisfied that it would be in the public interest to terminate the conservatorship of the First National Bank of Exeter and that it may safely be done. Therefore I do hereby terminate the . . . [the] conservatorship, effective February 26, 1962, at which

[1] Ten directors constituted the board of directors of the Exeter bank.

time the assets of the bank and the control of its affairs will be returned to its Board of Directors for the purpose of executing a sale of all of the assets of the bank to the Wyoming National Bank of Wilkes-Barre. Pursuant to Section 5220 United States Revised Statutes [12 U.S.C.A. §181], I have determined that an emergency exists and hereby waive the requirement for shareholder approval of the purchase and sale agreement."

The purchase and sale agreement was executed by the proper officers of both banks late on the afternoon of February 26, 1962. It is not clear from the record at what time the contract was executed and whether the execution was accomplished before or after receipt of the Comptroller's telegram. The agreement was subsequently approved by the Comptroller pursuant to 12 U.S.C.A. §1828(c).

At a meeting of the board of directors of the Exeter bank held on March 26, 1962, the purchase and sale agreement dated February 26, 1962 was confirmed by six directors voting in favor of the confirming resolution. Three directors voted against it.

In the court below the appellants challenged the validity of the contract of purchase and sale between the Exeter and Wyoming banks.[2] The appellants attempted to support their position on several grounds the most basic of which were that the Wyoming offer was not the best offer received by the Exeter bank and that the Exeter board of directors breached their fiduciary duty in accepting it, that in any event the Exeter directors did not have authority

[2] No question of contract interpretation arises in the instant case.

to accept the Wyoming offer on February 26, 1962 because a conservator was in charge of the affairs of the Exeter bank at that time, that the contract was not executed in compliance with national banking law, and that the Comptroller abused his discretion and acted contrary to law in several respects all of which served to invalidate the contract.

The court below granted the Comptroller's motion to dismiss the complaint as to him because the court was of the view that the Comptroller's discretion was exclusive and nonreviewable as to all questions raised in the complaint relating to him. An appeal was taken by the present appellants from the order of dismissal, but that appeal was properly dismissed on the ground that the appeal was not from a reviewable or appealable judgment under 28 U.S.C., Section 1291.[3] After the trial of the case against the remaining defendants the court below concluded that the Wyoming offer was the best offer received by the Exeter bank, that the defendant Exeter directors had breached no fiduciary duty in voting to accept the Wyoming offer, and that the agreement entered into between the Exeter and Wyoming banks was a valid contract.

The appellants have now appealed from the orders dismissing the complaint as to the Comptroller and also as to all the other defendants. The appellants challenge all the findings of the court below. They first assert that the Pittston rather than the Wyoming proposal was the best offer received by the Exeter bank for the sale

[3] The order was entered on October 17, 1962 at our No.

of its assets. We see no valid basis for disturbing the court below's finding on this point. Our conclusion in this regard disposes a fortiori of the appellants' contention respecting the alleged breach of a fiduciary duty on the part of the Exeter directors.

In view of the indefinite nature of some of its terms, it is questionable whether the Pittston offer was capable of a binding acceptance. In any event, the conditioning clause of the Pittston offer contemplated that "claims against undisclosed shortages" were to be charged against the escrow amount. It was well within the realm of possibility that subsequently disclosed shortages could serve to exhaust or at least substantially minimize the amount due the Exeter bank. On the other hand the Wyoming offer was definite and guaranteed the Exeter bank a minimum consideration. Under these circumstances it certainly cannot be flatly stated that the Pittston offer was preferable to that of the Wyoming bank. The decision as to which offer was the more satisfactory lay within the sound business discretion of the Exeter directors.[4]

The appellants next challenge the court below's conclusion respecting the validity of the contract entered into between the Exeter and Wyoming banks. Their attack is based on several grounds. It is first contended that the Exeter directors did not have the power or authority to accept the Wyoming offer on the morning of February 26, 1962 because at that time a conservator was officially in

[4] There is no proof other than that which tends to show that the financial interest of the majority directors of the Exeter bank was coincidental with the appellants' own best interest, *i.e.*, to make the most advantageous arrangement possible.

charge of the affairs of the Exeter bank. In our view even assuming the substance of their statement to be meritorious, it does not follow that the purchase and sale agreement was without effect.

The Exeter directors' acceptance of the Wyoming offer and presumably the actual signing of the agreement by the Exeter officers, took place prior to the termination of the conservatorship. But as the appellants themselves asserted in their complaint in the court below, "on February 26, 1962 the Wyoming National Bank of Wilkes-Barre, through its agents, servants and employees, took over complete operation of the First National Bank of Exeter." After termination of the conservatorship both parties to the contract acted in a manner entirely consistent with the agreement and indeed proceeded to start to carry out its terms. Moreover, on March 26, 1962, as we have said, the contract was formally approved by the Exeter directors by a vote of six to three.

On the basis of these facts, it could be validly concluded either that by their actions subsequent to the termination of the conservatorship the Exeter directors manifested their acceptance of the Wyoming offer or that in view of the reliance demonstrated by the Wyoming bank with respect to the agreement, the Exeter bank is estopped from denying the contract's validity on the technical ground urged here. We think the events which took place subsequent to February 26, 1962 serve to render moot any question concerning the possible incapacity or disability of the Exeter directors and officers to enter into the instant contract while the conservatorship was still in operation.

The appellants next contend that the purchase and sale agreement was invalid because the Comptroller had no power to terminate the conservatorship of the Exeter bank solely for the purpose of the execution of the sale agreement. Section 205, 12 U.S.C.A. provides as follows: "If the Comptroller of the Currency becomes satisfied that it may safely be done and that it would be in the public interest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business subject to such terms, conditions, restrictions and limitations as he may prescribe." The appellants argue that Section 205 must be read to the effect that the Comptroller is empowered to terminate a conservatorship of a national bank only for the purpose of enabling it to resume its normal every-day business. In our view while this issue is not necessarily a difficult one, under the facts and circumstances of this case no decision on the question is necessary.

It is unquestioned that at all pertinent times, the majority of the Exeter directors were in favor of accepting the Wyoming offer. They in fact purported to accept the Wyoming offer prior to receipt of the Comptroller's telegram and in a fundamental sense the telegram simply manifested approval of their action. We have previously concluded in this opinion that the Exeter directors' favorable inclination towards the Wyoming offer at all pertinent times, in no way serves to demonstrate a breach of fiduciary duty on their part. We are of the view that the appellants have not shown a sufficient causal relation between the Comptroller's order and the execution of the contract in question to give them the requisite standing to attack that order here. The appellants' alleged grievances

against the Comptroller directly relate to other considerations which we will now discuss.

The appellants challenge the validity of the contract on the ground that prior to its execution there had not been a vote in favor of liquidation by the Exeter shareholders owning two-thirds of the bank's stock. While the court below made no finding of fact on the point, it appears from the record that the matter of voluntary liquidation was not submitted to the Exeter shareholders until April 26, 1964 at which time the motion in favor of liquidation received majority support but not the necessary two-thirds vote of approval.

Section 181, 12 U.S.C.A., provides in pertinent part as follows: "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval."[5] The first sentence has been the law since June 3, 1864. See 13 Stat. 112 (1866). The second sentence is a recent amendment added to the section on September 8, 1959. 73 Stat. 458.

The House Committee on Banking and Currency in its report to the House concerning the 1959 amendment

[5] It is unquestioned that Section 181 is applicable to the case at bar.

stated the following: "Section 15 [of H.R. 8159, 86th Cong., 1st Sess. (1959)] provides that if a liquidation of a national bank is to be effected through the sale of any of its assets to another bank in consideration of an assumption of its liabilities, the approval of the purchase and sale agreement by shareholders owning two-thirds of the bank's stock must be obtained. While the voluntary liquidation must be so approved under existing law, and while it has been the policy of the Comptroller of the Currency to require that the shareholders also approve the purchase and sale agreement, it is believed that there should be a statutory requirement of such approval. The Comptroller of the Currency may waive this requirement for shareholder approval if an emergency exists." H.R. Rep. No. 694, 86th Cong., 1st Sess. 3 (1959).

The corresponding report of the Senate Committee on Banking and Currency to the Senate explained the purpose of the new requirement respecting shareholder approval as follows: "Section 15 would amend Revised Statutes, section 5220 (12 U.S.C. 181), relating to the liquidation of national banks, by adding a requirement that shareholders must approve a purchase and sale agreement if any part of the liquidation is to be accomplished by the sale of any of the bank's assets, but excusing the need for such a vote if in an emergency the Comptroller specifically waives it. Existing law does not require shareholder approval of any agreement the directors may make for a bulk sale of bank assets to another bank as a preliminary step to voting the selling bank into voluntary liquidation. This new provision would provide for a shareholder vote in such cases, except in emergencies. Substantially the same amendment was included in the

Financial Institutions Act: Title 1, section 58(a) (p. 50)."[6] S. Rep. No. 730, 86th Cong., 1st Sess. 4-5 (1959).

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[6] For reasons not pertinent here the Financial Institutions Act did not become law. Section 58(a) of Title I of the act provided as follows: "Any national banking association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller specifically waves [*sic*] such requirement for shareholder approval."

Section 58(a) was based at least in part on the following recommendation made by the Comptroller of the Currency, Mr. Gidney, to the Senate Committee on Banking and Currency: "It is recommended that section 5220 of the Revised Statutes [12 U.S.C.A. §181] be amended to require approval by shareholders owning two-thirds of the stock of any national bank before the assets of said bank may be sold to another banking institution in carrying out the liquidation of the selling bank." The reason for the suggestion was that "section 5220 now requires shareholder approval of any vote to place a national bank in voluntary liquidation but does not require shareholder approval of any agreement entered into by the directors relating to a bulk sale of the bank's assets to another banking institution as a preliminary step to voting the bank into voluntary liquidation. In order to permit shareholders to have a vote on the vital question of selling the bank's assets it is believed the statute should be amended so as to require preliminary approval of the sale by shareholders owning two-thirds of the stock of the national bank." Hearings to Consider the Legislative Recommendations of the Federal Supervisory Agencies Before the Senate Committee on Banking and Currency, 84th Cong., 2nd Sess., pt. 1, at 44 (1956). See Hearings on Financial Institutions Act of 1957 Before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 2, at 457 (1957).

Before the House Committee on Banking and Currency, the Comptroller stated: "Under present law shareholder's ap-

The reason for the exception in the case of emergencies does not clearly appear but it is sufficiently obvious that its *raison d'etre* was that for practical considerations it was thought desirable that the shareholder vote be dispensed with in urgent circumstances.[7]

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is not required for a bulk sale of the bank's assets to another bank as a preliminary step to placing the bank into voluntary liquidation.

"The Comptroller has insisted that shareholders vote on and approve such transactions, but we believe the shareholders should have a statutory right to vote on the vital question of selling the bank's assets." Hearings on Financial Institutions Act of 1957 Before the House Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 1, at 162 (1957).

[7] Speaking before a Subcommittee of the House Committee on Banking and Currency, Mr. Wolcott, the Chairman of the Federal Deposit Insurance Corporation, stated: "Section 16 of H.R. 6093 [later superseded by H.R. 8159 which was subsequently enacted as the 1959 amendment] would require approval by shareholders owning two-thirds of the stock of any national bank if its 'liquidation is to be effected in whole or in part through the sale of its assets to and the assumption of its deposit liabilities by another bank,' unless an emergency exists and the Comptroller specifically waives such requirement for shareholder approval.

"In *City National Bank of Huron, S.D. v. Fuller*, (52 F. (2d) 870 (8th Cir., 1931)), it was said that the directors may sell all the assets of a national bank where it is necessary for the protection of creditors in view of its approaching insolvency.

"The proposed authority of the Comptroller to waive the requirement for shareholder approval is necessary and proper, we believe, to protect the Corporation from delays in rendering financial assistance to national banks in emergency situations. However, it is suggested that the words 'sale of its assets' be changed to the words 'sale of any of its assets' to avoid any implication that such provision is only applicable to the sale of all its assets." Hearings on H.R. 6092 and H.R. 6093 Before Subcommittee No. 2 of the House Committee on Banking and Currency, 86th Cong., 1st Sess. 39 (1959).

It is plain from the face of the statute and the report to the House of Representatives that in order to effect a voluntary liquidation, Section 181 contemplates two distinct shareholder votes in the circumstance at bar: one respecting voluntary liquidation as such and the other concerning approval of the purchase and sale agreement. The Comptroller's power to waive shareholder approval in appropriate circumstances extends to this latter vote requirement. The Report to the Senate makes clear a point somewhat equivocal in the House Report, that it was contemplated that liquidation contracts could be entered into without a prior shareholder approval of liquidation. Indeed this practice was viewed as being sanctioned under pre-existing law and constituted the situation at which the new legislation was directed.

In view of this background we do not see how it can be reasonably argued that the instant contract was invalid either because it was executed prior to shareholder approval of liquidation or what reduces itself to the same thing, because the liquidation was not subsequently approved by the necessary two-thirds vote of the shareholders.[8] Assuming for purposes of discussion that the Comptroller's action in waiving shareholder approval of the contract of sale was valid, an issue which we will consider at a subsequent point in this opinion, the executed contract was not open to valid attack. Section 181 when read in the light of its legislative history assumes a situation in which a board of directors first negotiates a purchase and sale agreement in contemplation of a voluntary

[8] Of course a particular contract for the sale of assets does not come at all within the purview of the 1959 amendment unless it is made in contemplation of liquidation.

liquidation. In the usual case a vote of the shareholders owning two-thirds of the stock will be necessary in order to validate the agreement. In an emergency situation in which the Comptroller validly waives the right of shareholder approval of the agreement, the validity of the contract does not depend upon shareholder approval. In either case it is still open to the shareholders by subsequent vote to determine whether they desire a completion of the voluntary liquidation or a continuation of the corporate existence.

The 1959 statute resulted from a belief on the part of Congress that shareholders to that time had not had effective control over the execution of bulk sale agreements made in contemplation of liquidation. What seems implicit in this view is a conclusion to the effect that the validity of such an agreement in no way related to or was dependent upon the subsequent receipt of the necessary two-thirds vote of approval of liquidation. If the view of Congress had been to the contrary in this regard, no additional protection of shareholders would have been required inasmuch as dissenting shareholders could just as effectively express their disapproval of a particular contract by means of their vote as to liquidation. Similarly, on this assumption the Comptroller's power of waiver would be substantially meaningless. The validity of purchase and sale contracts entered into in times of emergency with shareholder approval waived, would depend on a subsequent vote in favor of liquidation. Shareholders considering a particular offer undesirable could effectively "kill" the contract by means of their liquidation vote. No better example of this is provided than by the facts of the case at bar. The essential relief requested by the ap-

pellants was a declaration of invalidity of the Exeter-Wyoming contract, an injunction forbidding the parties from taking any action under the contract, and an order directing the officers and directors of the Exeter bank to submit to the shareholders for approval all offers presently existing or hereafter obtained for the purchase of the bank's assets. We conclude that the appellants' position is without merit.

Appellants finally contend that the Exeter-Wyoming contract was invalid because the Comptroller was without power to waive the right of shareholder approval as to it in the present circumstance. The issue posed in the instant context relates to whether or not an emergency existed respecting the Exeter bank within the purview of Section 181. As previously indicated the court below adopted the view that all matters involving the judgment of the Comptroller in the case at bar were within his sole and exclusive discretion, non-reviewable by the court. The complaint was therefore dismissed as against the Comptroller. For reasons stated hereinafter, we are of the view that the court below erred in this regard insofar as its order related to and precluded review respecting the Comptroller's determination of the existence of an emergency. The necessity, we think, for some type or measure of judicial review concerning this determination indicates that the Comptroller must be treated as a necessary if not an indispensable party within the meaning of Rule 19, Fed. R. Civ. P., 28 U.S.C., in the instant case.[9]

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[9] Rule 19 provides in pertinent part: "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When

The 1959 amendment to Section 181 provides that purchase and sale agreements must be approved by the shareholders owning two-thirds of the bank's stock "unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval." It will be noted that the emergency phrase and the waiver phrase are conjoined. The language employed with respect to emergency is sharply distinguishable from that evidenced in other sections of the national banking statute involving decisions of the Comptroller such as those concerning appointment of a conservator and termination of a conservatorship. Thus Section 203, 12 U.S.C.A., reads in pertinent part: "*Whenever he shall deem it necessary* in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security

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a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"(b) Effect of Failure To Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

The distinction between indispensable and necessary parties is immaterial for purposes of the issues raised on this appeal.

as the Comptroller of the Currency deems proper. (Emphasis added.)" Section 205, U.S.C.A., quoted *supra,* concerning termination of a conservatorship contains substantially similar language. See generally 1 Davis, Administrative Law, §4.04 (1958). We cannot consider the differing language in Section 181 to have been employed inadvertently, particularly in view of the fact that the moving force in the enactment of the amendment was a desire on the part of Congress to increase protection for shareholders. To construe the statute as entrusting to the Comptroller a non-reviewable discretion in this area would have the opposite effect, e.g., that of decreasing the safeguards available to shareholders under pre-existing law, in at least one basic respect.[10] We conclude that the Comptroller's determination respecting the existence of an emergency is reviewable and that remand is necessary for consideration of the question in the first instance by the court below.

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[10] The broad statement contained in the report of the Senate Committee on Banking and Currency set out in the opinion *supra,* that "existing law does not require shareholder approval of any agreement the directors may make for a bulk sale of bank assets to another bank as a preliminary step to voting the selling bank into voluntary liquidation" is a literal overstatement respecting the pertinent law. Under pre-existing law shareholders were empowered to challenge such agreements as not having been necessary for the protection of creditors. See, e.g., Wannamaker v. Edisto Nat'l Bank, 62 F. 2d 696 (4 Cir., 1933); City Nat'l Bank of Huron v. Fuller, 52 F. 2d 870 (8 Cir., 1931). See also the statement set out in note 6, *supra.* And of course an agreement can always be attacked as being the product of fraud or bad faith. The legislative history of the 1959 amendment leaves no doubt that it was not contemplated that the new enactment effected or was to effect a significant substantive change in the law.

The sole issue that remains for discussion is the test to be applied by the court below on remand. While we have concluded that the Comptroilers' determination respecting the existence of an emergency is reviewable, nevertheless it is manifest that the Comptroller is charged with the fundamental power of decision on this question. The standard to be applied is not whether an emergency in fact existed but whether a reasonable man on the basis of facts of which he was aware or should have been aware, could have reasonably concluded that an emergency existed. All matter relevant to a proper consideration of this question will be of course admissible into evidence. The extent if any to which it is proper to specifically define or give some semblance of meaning to the term "emergency" as employed in Section 181, we leave initially to the judgment of the court below after consideration of the facts and the legal arguments presented. In so holding we believe that we have given due consideration to the authorities cited on the brief of the Comptroller and strongly relied on by his counsel in oral argument. We do not find these cases to be apposite here. To so hold would, we think, be contrary to the intent of Congress. See, again, notes 6, 7, and 10, *supra*, and the text of this opinion to which they are cited.

We have considered the other points raised by the parties and are of the view that none requires discussion.

The order of July 2, 1962, dismissing the complaint as to the Comptroller will be reversed, as also will be the order of July 12, 1963, dismissing the complaint as to the other defendants. The cause will be remanded with the direction to reinstate the Comptroller as a party defendant and to reinstate the complaint as to all the defendants

and to take further proceedings consistent with this opinion. Costs will be taxed in favor of the plaintiffs-appellants and against all the defendants-appellees except the Comptroller.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

COMPTROLLER OF THE CURRENCY
TREASURY DEPARTMENT
Washington 25

Address Reply to
"Comptroller of the Currency"

April 11, 1962

Dear Mr. Chairman:

In response to your inquiry, I wish to state below our position on the Exeter, Pennsylvania, conservatorship.

The First National Bank of Exeter was an institution of just under $3,000,000 deposits, located in the anthracite coal region of Pennsylvania. Early this year there came to light a large defalcation the full amount of which was not readily determinable. As a result there came to my attention information which raised serious questions concerning some stockholders and directors and officers of the bank. It became patently clear that the continued operation of even a sound bank by these persons would be inimical to the bank as well as prejudicial to the interests of the depositors.

As an audit of the bank progressed the amount of the defalcation continued to rise to the point where it was obvious that the bank could not be permitted to continue operating although there was doubt as to whether it could be held to be technically insolvent. In light of these facts, plus the failure of the persons involved to work out a satisfactory sale or reorganization of the bank, a serious question as to the liability by the insurer on the bank's umbrella bond, the fact that a receiver may be appointed by the Comptroller only if he is satisfied that the bank is

insolvent, etc., there was no alternative but to seek some satisfactory means of conserving the assets of the bank until the full amount of defalcation could be ascertained, the liability or lack of liability of the bonding company could be better established, and there could be determined whether a prompt sale or reorganization of the bank could be accomplished.

There was reason to believe that the bank could be sold. In spite of its difficulties the bank at no time lost the confidence of the banking public in Exeter, and there was no run nor heavy withdrawals of deposits. A number of sound and well managed banks in the area had expressed an interest in acquiring the bank. Such an acquisition would, of course, insure the continuation of sound, adequate banking service in the community with all deposits immediately available and a minimum of harmful publicity. This would clearly be preferable to receivership even if I had had legal authority to place the bank in receivership. The appropriate and perhaps only way the depositors could be protected until the bank could be sold was through a conservatorship.

Accordingly, acting under clear statutory authority, I placed the bank in conservatorship, appointing as conservator Mr. Russell E. Gardner, Vice President of the Miners National Bank of Wilkes-Barre, and a former national bank examiner. Mr. Gardner assumed control of the bank on the morning of February 20, 1962. During the seven days of the conservatorship, the bank continued to have the confidence of the public, and although withdrawal of funds was limited to 10% there was no rush on the part of the depositors to withdraw the amount permitted, but the bank continued to operate in the usual way subject to the limitation.

During this period there was agreed upon by the directors of the bank a sale of the assets to The Wyoming National Bank of Wilkes-Barre which assumed all deposit and other liabilities. I terminated the conservatorship on February 26, 1962. The Wyoming National Bank, a solid and well managed bank opened its branch in Exeter to the accompaniment of public celebration. All deposits immediately became available.

There can be no doubt that the use of the conservatorship in this case was in the best interests of all concerned. In the first place, at no time were deposits totally unavailable, but 10% was available to each depositor. Secondly, the limitation upon withdrawals lasted only seven days, compared with the somewhat longer period required to commence payment of deposits under a receivership. We emphasize the word "commence" because the technical and pondrous machinery of a receivership frequently results in extended delays before full payout is warranted.

Thirdly, the sale which was accomplished during the conservatorship resulted in continuity of banking services in Exeter with all deposits immediately available as deposits in a sound bank. In a receivership uninsured deposits may never have been paid.

Fourthly, there were avoided the heavy costs of forced liquidation of assets which all will realize results in receivership cases. Moreover, receiverships frequently extend over an extended period of time. Fifthly, the shareholders of the bank were benefited by the premium paid as well as the avoidance of receivership costs so that they realized more on their investments than would otherwise have been possible. Lastly, whatever drain there

might otherwise have been upon the funds of the Federal Deposit Insurance Corporation was avoided.

There can be no doubt whatsoever that the people in Exeter, as indeed people everywhere, will recognize and realize the difference between a receivership and a conservatorship. The word "receivership" imparts one, and only one thought, forced liquidation and substantial loss. The word "conservatorship" also imparts a thought, and only one thought, a conserving, a saving, and in the case at hand, a complete saving resulting to the benefit of all.

It was, indeed, a unique set of facts and circumstances which caused and warranted the action I took in invoking the conservatorship provision. On two previous occasions since I have held this office, I have placed institutions in receivership, as the facts in those cases clearly warranted such action. In the Exeter case, I could not reasonably have done so at the time the bank was placed in conservatorship. The conservator provisions of the National Bank Act are an important and an essential element of the proper and publicly beneficial administration of the National Banking System. The Congress wisely enacted these provisions many years ago, and with equal wisdom declined, in 1957, in connection with the Financial Institutions Act, to repeal or even to amend these well-established practices and well-justified provisions of law.

Regulatory authority in banking requires maximum flexibility of tools so that the tool employed may be adapted to the facts and circumstances of a given case. The proper use of the tool proper to the case at hand avoids the harsh result of employment of a tool not

properly natural, or realistically adapted to the requirements of a given set of facts and circumstances. It is only by the employment of a tool proper to the case at hand that the public interest can best be served.

How frequently the particular set of facts and circumstances which arose in Exeter may arise again in the future, no man can say. It must be said that such a concatenation of facts and circumstances will, in all likelihood, not often be made. But, however infrequent or rare the occurrence of such a situation may in the future be, the tool should be available to meet it. In Exeter, the proper tool was unquestionably the conservatorship and proper protection of the public interest would also unquestionably require the preservation of that tool without change.

Sincerely,

James J. Saxon,

Comptroller of the Currency.

The Honorable
Brent Spence, Chairman
Committee on Banking and Currency
House of Representatives
Washington 25, D. C.

STATUTES INVOLVED

Title 12, U.S.C.A. Banks and Banking:

VOLUNTARY DISSOLUTION

§181. *Voluntary dissolution; appointment and removal of liquidating agent or committee; examination*

Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval.

The shareholders shall designate one or more persons to act as liquidating agent or committee, who shall conduct the liquidation in accordance with law and under the supervision of the board of directors, who shall require a suitable bond to be given by said agent or committee. The liquidating agent or committee shall render annual reports to the Comptroller of the Currency on the 31st day of December of each year showing the progress of said liquidation until the same is completed. The liquidating agent or committee shall also make an annual report to a meeting of the shareholders to be held on the date fixed in the articles of association for the annual meeting, at which meeting the shareholders may, if they see fit, by a vote

representing a majority of the entire stock of the bank, remove the liquidating agent or committee and appoint one or more others in place thereof. A special meeting of the shareholders may be called at any time in the same manner as if the bank continued an active bank and at said meeting the shareholders may, by vote of the majority of the stock, remove the liquidating agent or committee. The Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied, and the expense of making such examinations shall be assessed against such bank in the same manner as in the case of examinations made pursuant to section 481-485 of this title. As amended Sept. 8, 1959, Pub. L. 86—230, §15, 73 Stat. 458.

(12 USCA, Banks and Banking, 1964 Cumulative Annual Pocket Part, p. 59)

§192. *Default in payment of circulating notes*

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the

court shall direct. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. As amended Sept. 8, 1959, Pub. L. 86—230, §17, 73 Stat. 458.

(12 USCA, Banks and Banking, 1964 Cumulative Annual Pocket Part, p. 6)

NATIONAL BANKS

§203. *Conservator; appointment, powers, and duties, compensation*

Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank

and require of him such bond and security as the Comptroller of the Currency deems proper. The conservator, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this subchapter, to which receivers are now or may hereafter become subject. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this subchapter, be the same as if a receiver had been appointed therefor. All expenses of any such conservatorship shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien. The conservator shall receive as salary an amount no greater than that paid to employees of the Federal Government for similar services. Mar. 9, 1933, c. 1, §203, 48 Stat. 2.

(12 USCA, Banks and Banking, p. 615)

§205. *Termination of conservatorship; resumption of business*

If the Comptroller of the Currency becomes satisfied that it may safely be done and that it would be in the public interest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business subject to such terms, conditions, re-

strictions and limitations as he may prescribe. Mar. 9, 1933, c. 1, §205, 48 Stat. 3.

(12 USCA, Banks and Banking, p. 618)

§208. *Provisions as to segregation of deposits inapplicable after termination of conservatorship; notice of termination*

After fifteen days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in section 207 hereof, the provisions of section 206 of this title with respect to the segregation of deposits received while it is in the hands of the conservator and with respect to the use of such deposits to liquidate the indebtedness of such bank shall no longer be effective: *Provided*, That before the conservator shall turn back the affairs of the bank to its board of directors he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the Comptroller of the Currency published in the State in which the bank is located, a notice in form approved by the Comptroller, stating the date on which the affairs of the bank will be returned to its board of directors and that the said provisions of section 206 of this title will not be effective after fifteen days after such date; and on the date of the publication of such notice the conservator shall immediately send to every person who is a depositor in such bank under section 206 a copy of such notice by registered mail addressed to the last known address of such person as shown by the records of the bank, and the conservator shall send similar notice

in like manner to every person making deposit in such bank under section 206 after the date of such newspaper publication and before the time when the affairs of the bank are returned to its directors. Mar. 9, 1933, c. 1, §208, 48 Stat. 4.

(12 USCA, Banks and Banking, pp. 621-622)